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12 UNITED STATES DISTRICT COURT
13 NORTHERN DISTRICT OF CALIFORNIA
14 SAN FRANCISCO DIVISION
15

16 B&O MANUFACTURING, INC.,
17 Plaintiff,
18 v.
19 HOME DEPOT U.S.A., INC.,
20 Defendant.
21

CASE NO. C07 02864 JSW

**DEFENDANT'S RESPONSES TO
PLAINTIFF'S EVIDENTIARY
OBJECTIONS TO MEMORANDUM OF
POINTS AND AUTHORITIES**

22
23 Defendant Home Depot U.S.A., Inc. ("Home Depot") respectfully submits these
24 Responses to Plaintiff B&O Manufacturing, Inc.'s ("B&O") "Evidentiary Objections to
25 Memorandum of Points and Authorities In Support of Motion to Transfer Venue to the Northern
26 District of Georgia and to Dismiss Counts Two Through Five of Plaintiff's Second Amended
27 Complaint."
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1 Although B&O has styled its objections as evidentiary, most of the passages in Home
2 Depot's brief that B&O challenges are neither presented as evidence nor based on evidence. The
3 only evidence Home Depot has presented is the Declaration of David Curley, which
4 appropriately supports Home Depot's Motion to Transfer Venue. *See Jaco Env't'l Inc. v.*
5 *Appliance Recycling Ctrs. of Am., Inc.*, __ F.3d __, 2007 WL 951274, at *1 (N.D. Cal. Mar. 27,
6 2007) (district court may consider evidence in ruling on a motion to transfer venue); *see also*
7 Home Depot's Response to Plaintiff's Evidentiary Objections to the Declaration of David Curley
8 (filed concurrently). Home Depot is well aware that the Court's ruling on a Motion to Dismiss
9 will address only the allegations in the Complaint and the contracts and documents B&O has
10 referenced therein. *See Papasan v. Allain*, 478 U.S. 265, 283 (1986); *Hal Roach Studios, Inc. v.*
11 *Richard Feiner & Co.*, 896 F.2d 1542, 1555 n.19 (9th Cir. 1989); Fed. R. Civ. P. 10(c).

12 Accordingly, B&O's evidentiary objections are inappropriate at this procedural stage and
13 have no bearing on the motion currently before the Court. For the record, however, Home Depot
14 responds further as set forth below.

	<u>OBJECTIONS</u>	<u>RESPONSES</u>
1.	<p>General Objection.</p> <p>None of Defendant's purported facts, as contained within its</p> <p>"INTRODUCTION" is in compliance with applicable Rule of Evidence. Defendant, in its</p> <p>"INTRODUCTION," fails to refer to any evidence whatsoever, let alone admissible evidence. All evidence submitted to the Court in support of Defendant's Motion must be admissible. <i>Traveler's Casualty Ins. Co. of America v. TelStar Const. Co.</i>, D. Ariz. 252 F. Supp. 917, 922 (2003); N.D. Cal. Local Rule 7-5(b). Defendant makes many statements without any evidentiary support whatsoever.</p>	<p>The Introduction to Home Depot's brief does not purport to submit evidence to the Court. Home Depot understands that the Court must "accept[] B&O's allegations as true" for purposes of the motion to dismiss. <i>See</i> Home Depot Br. at 3; Fed. R. Civ. P. 12(b)(6). The Introduction provides background to help the Court understand Home Depot's position in this dispute. And, many of the facts in the Introduction can be found in B&O's Complaint.</p> <p>The only evidence Home Depot has submitted at this time is the declaration of David Curley, properly offered to support Home Depot's Motion to Transfer Venue, not the Motion to Dismiss. <i>See Jaco Env't'l</i>, 2007 WL 951274, at *1.</p>
2.	<p>Page 2:20-21, commencing with "The, and ending with "million." Local Rule 7-5(a) and (b). No evidentiary support. See ¶ 1 (General Objection).</p>	<p>Because objections Two through Seven all refer to portions of the Introduction to Home Depot's brief, Home Depot respectfully incorporates by reference its Response to B&O's First Objection above. <i>See also</i> Curley Decl. ¶ 5 (testimony on point).</p>

1	3.	Page 2:21-22, commencing with	Because objections Two through Seven all refer to
2		“further.”	portions of the Introduction to Home Depot’s brief,
3		Local Rule 7-5(a) and (b). No	Home Depot respectfully incorporates by reference its
4		evidentiary support. See ¶ 1	Response to B&O’s First Objection above. <i>See also</i>
5		(General Objection).	Curley Decl. ¶ 5.
6			
7	4.	Page 2:21-25; commencing with	Because objections Two through Seven all refer to
8		“Despite,” and ending with “time.”	portions of the Introduction to Home Depot’s brief,
9		Local Rule 7-5(a) and (b). No	Home Depot respectfully incorporates by reference its
10		evidentiary support. See ¶ 1	Response to B&O’s First Objection above. <i>See also</i>
11		(General Objection).	Curley Decl. ¶¶ 5-6.
12			
13	5.	Page 3:3-4 commencing with the first	Because objections Two through Seven all refer to
14		“B&O.”	portions of the Introduction to Home Depot’s brief,
15		Local Rule 7-5(a) and (b). No	Home Depot respectfully incorporates by reference its
16		evidentiary support. See ¶ 1	Response to B&O’s First Objection above.
17		(General Objection).	
18	6.	Page 3:8-9 commencing with the first	Because objections Two through Seven all refer to
19		“Home Depot,” ending with “issue.”	portions of the Introduction to Home Depot’s brief,
20		Local Rule 7-5(a) and (b). No	Home Depot respectfully incorporates by reference its
21		evidentiary support. See ¶ 1	Response to B&O’s First Objection above.
22		(General Objection).	
23	7.	Page 3:10-12, commencing with	Because objections Two through Seven all refer to
24		“B&O.”	portions of the Introduction to Home Depot’s brief,
25		Local Rule 7-5(a) and (b). No	Home Depot respectfully incorporates by reference its
26		evidentiary support. See ¶ 1	Response to B&O’s First Objection above.
27		(General Objection).	
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1	8.	Page 7:14-17 (“Moreover, the	The passage B&O challenges here is based on
2		Complaint infers the nefarious	facts alleged in B&O’s Complaint and is neither
3		involvement of Home Depot’s legal	submitted as evidence nor based on evidence. This
4		department solely from the approval	observation comes from the Complaint and the
5		stamp Home Depot’s legal	attached Refund Agreement, which the Court may
6		department apparently placed on the	consider on a motion to dismiss. <i>See</i> Compl. ¶¶ 16-18;
7		Refund Agreement <i>after</i> B&O signed	<i>Hal Roach Studios</i> , 896 F.2d at 1555 n.19 (district
8		it and presented it to Home Depot’s	court may consider documents referenced in
9		business representative. Compl.	Complaint on motion to dismiss).
10		¶ 16.”).	
11		Local Rule 7-5(a) and (b). No	
12		evidentiary support. See ¶ 1	
13		(General Objection).	

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9. Page 7, footnote 2 (“**The Complaint also cites the nearly identical Cal. R. of Prof. Conduct § 2-100, but it is unclear why that rule would apply to Home Depot’s Atlanta-based lawyers when they were working in Georgia.**”)

Local Rule 7-5(a) and (b). No evidentiary support. See ¶ 1 (General Objection).

B&O’s evidentiary objection to this footnote is puzzling. Presumably B&O does not contest that its Complaint cites California Rule of Professional Conduct § 2-100. *See* Compl. ¶ 19. In addition, Home Depot’s argument that Rule 2-100 does not apply is not evidence to which B&O could object.

To the extent B&O objects to the claim that Home Depot’s lawyers are based in Atlanta and were working in Georgia at the relevant time, that claim is supported by the Affidavit of David Curley. *See* Curley Decl. ¶ 7. The Atlanta location of Home Depot’s lawyers relevant to this dispute is also strongly suggested by the Complaint, which focuses on events taking place in Atlanta on January 31, 2006. *See* Compl. ¶¶ 15-19.

As above, the Court should reject B&O’s evidentiary objection to arguments in Home Depot’s brief.

DATED: October 12, 2007.

BONDURANT, MIXSON & ELMORE, LLP

By: /s/Christopher T. Giovinazzo
Christopher T. Giovinazzo
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Attorneys for Defendant
HOME DEPOT U.S.A., INC.

CERTIFICATE OF SERVICE

I hereby certify that on October 12, 2007 I have electronically filed the within and foregoing **DEFENDANT'S RESPONSES TO PLAINTIFF'S EVIDENTIARY OBJECTIONS TO MEMORANDUM OF POINTS AND AUTHORITIES** with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to the following attorney of record, and by U.S. mail, postage prepaid thereon, addressed as follows:

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/s/Christopher T. Giovinazzo
Christopher T. Giovinazzo